LOO CHOO TENG & ANOR

v.

CHEOK SWEE LEE & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: P-02-556-1997]
21 FEBRUARY 2000

CONTRACT: *Terms and conditions - Conditional contract - Sale and purchase agreement - Agreement void if State Government refused to release subject property from compulsory acquisition - State Government in process of cancelling notice of acquisition - Whether there was no refusal by State Government to release - Whether contingency in agreement did not materialise - Whether agreement valid and binding - Whether agreement available for specific performance*

The plaintiffs had entered into a sale and purchase agreement ('the agreement') with the defendants, the additional trustees of the estate of Ong Joo Sun ('the deceased'). By the agreement, the plaintiffs undertook to purchase a certain property belonging to the deceased's estate ('the subject property'). The facts showed that the subject property was then pending acquisition by the State Government, and that being so, the agreement provided: (i) by cl 3 thereof, that the purchase was subject to the State Government releasing the subject property to the deceased's estate; (ii) by cl 5 thereof, that the agreement would be rendered null and void if within two years the State Government shall refuse to release the subject property from the intended acquisition; (iii) by cl 7 thereof, that the trustees shall apply to the State Government for the release of the subject property; and (iv) by cl 8 thereof, that the trustees shall also apply to the court for sanction to sell the subject property.

It was not in dispute that, within the stipulated period in cl 5 aforesaid, the Collector of Land Revenue had written three letters to the defendants informing the latter that steps had been taken to cancel the relevant notice of acquisition. The letters notwithstanding, the defendants contended that the subject property had not been released by the State Government, and they therefore treated the agreement as having come to an end when the two-year period expired. The plaintiffs contended that the agreement was still valid and subsisting, and in the circumstances applied for and obtained specific performance of the agreement. The defendants appealed. The main

issues that arose were: (i) whether the agreement was available for enforcement; and if so (ii) whether specific performance could be decreed in the absence of a court order granting leave to sell the subject property.

Held:

Per Gopal Sri Ram JCA

[1] Clause 5 of the agreement is not couched in affirmative language. It does not say that the State Government must release the subject property from compulsory acquisition. It is rather couched in negative terms. What the parties postulated was a refusal from the State Government to release the subject property from compulsory acquisition. If there had been a refusal, then the agreement would be at an end, and there would be no contract available for enforcement.

[2] The letters of the Collector show that there was no refusal. Thus, the contingency provided for by the sale and purchase agreement did not happen. The contract contained in the agreement therefore holds good and the respective obligations thereunder are available for specific performance. The agreement, in short, was valid and binding upon the parties.

[3] It would be unjust to the plaintiffs to deny them specific relief altogether. There is here a contract for the sale of immovable property. It is the kind of obligation that statute rebuttably presumes to be incapable of being remedied by an award of monetary compensation. Moreover, this appears to be a case where the vendors, having entered into a perfectly valid transaction, went abount inventing all sorts of excuses to get out of it. Having failed in their effort, it would be quite wrong to permit them to succeed, as it were, on the strength of a mere side-wind.

[4] The main obstacle envisaged by the parties to the sale was the State Government's refusal to release the subject property from compulsory acquisition. That hurdle having been crossed, all that remains is the formality of obtaining the court's sanction for the sale. This is thus an appropriate case to decree specific performance, not as ordered by the learned judge, but on terms.

[5] The order of the learned judge is varied by decreeing specific performance on terms that the defendants apply to court, not later than seven days hereof, for formal sanction as provided in cl 8 of the agreement. In the event the defendants make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject

property to them. And, should sanction be refused by the court, it would be open to the defendnats to move for the decree to be vacated on the ground of impossibility of performance. The appeals are dismissed save for the variation.

[Appeals dismissed; order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes.]*

Plaintif-plaintif telah memasuki satu perjanjian jualbeli ('perjanjian tersebut') dengan defendan-defendan, pemegang-pemegang amanah tambahan harta pusaka Ong Joo Sun ('simati'). Melalui perjanjian tersebut, plaintif-plaintif mengakujanji untuk membeli suatu hartanah tertentu kepunyaan harta pusaka si mati ('hartanah yang diperihalkan'). Fakta-fakta menunjukkan bahawa hartanah yang diperihalkan ketika itu masih menantikan pengambilan oleh Kerajaan Negeri, dan oleh keadaan yang sedemikian, perjajian tersebut memperuntukkan: (i) melalui fasal 3, bahawa pembelian tersebut adalah tertakluk kepada Kerajaan Negeri melepaskan hartanah yang diperihalkan itu kepada harta pusaka si mati; (ii) melalui fasal 5, bahawa perjanjian itu akan menjadi batal dan tak sah dalam tempoh dua tahun Kerajaan Negeri enggan untuk melepaskan hartanah yang diperihalkan daripada pengambilan yang diniatkan itu; (iii) melalui fasal 7, bahawa pemegang-pemegang amanah akan memohon kepada Kerajaan Negeri untuk pelepasan hartanah yang diperihalkan itu; dan (iv) melalui fasal 8, bahawa pemegang-pemegang amanah tersebut akan juga memohon kepada mahkamah untuk persetujuan bagi menjual hartanah yang diperihalkan itu.

Adalah tidak dipertikaikan bahawa, dalam tempoh masa yang ditetapkan dalam fasal 5 yang tersebut di atas, Pemungut Hasil Tanah telah menulis tiga pucuk surat kepada defendan-defendan memaklumkan pihak yang terkemudian itu bahawa langkah-langkah telah diambil untuk membatalkan notis pengambilan yang berkenaan. Meskipun terdapatnya surat tersebut, defendan-defendan menegaskan bahawa hartanah yang diperihalkan itu masih belum dilepaskan oleh Kerajaan Negeri, dan mereka dengan itu mengganggap perjanjian tersebut sebagai telah berakhir apabila tempoh dua tahun tersebut luput. Plaintif-plaintif menegaskan bahawa perjanjian tersebut masih sah dan berkekalan, dan dalam keadaan tersebut telah memohon dan pemperolehi pelaksanaan spesifik perjanjian tersebut. Defendan-defendan telah merayu. Isu-isu utama yang berbangkit adalah (i) samada perjanjian tersebut tersedia untuk penguatkuasaan; dan jikasedemikian (ii) samada pelaksanaan spesifik harus didekrikan dalam ketiadaan perintah mahkamah memberi kebenaran untuk menjual hartanah yang diperihalkan itu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Fasal 5 perjanjian tersebut tidak dibuat dalam bahasa yang mengiakan. Ianya tidak menyatakan bahawa Kerajaan Negeri semestinya melepaskan hartanah yang diperihalkan daripada pengambilan wajib. Ianya diungkap dalam ertikata yang negatif. Apa yang telah dikatakan oleh pihak-pihak tersebut adalah penolakan Kerajaan Negeri untuk melepaskan hartanah yang diperihalkan itu daripada pengambilan wajib. Jika terdapatnya penolakan, maka perjanjian itu akan tamat, dan tidak akan terdapat sebarang kontrak yang tersedia ada untuk penguatkuasaan.

[2] Surat-surat pemungut menunjukkan bahawa tidak terdapat penolakan. Oleh itu, kontinjensi yang diperuntukkan oleh perjanjian jualbeli tersebut tidak berlaku. Kontrak yang terdapat dalam perjanjian tersebut dengan itu boleh dikuatkuasakan dan kewajipan-kewajipan masing-masingnya di bawahnya adalah tersedia ada untuk pelaksanaan spesifik. Perjanjian tersebut, secara ringkasnya, sah dan mengikat pihak-pihak tersebut.

[3] Ianya adalah tidak adil kepada plaintif-plaintif untuk menafikan kepada mereka relif spesifik tersebut sama sekali. Di sini terdapat satu kontrak untuk penjualan harta tak boleh alih. Ianya satu jenis kewajipan yang statut menganggapkan tidak boleh diremedikan melalui satu award wang pampasan. Lagipun, ini kelihatan sebagai satu kes di mana penjual-penjual tersebut, setelah memasuki satu transaksi yang sah dengan sempurnanya, berusaha dengan pelbagai jenis alasan untuk keluar daripadanya. Setelah gagal dalam usaha mereka, ianya agak salah untuk membenarkan mereka berjaya, sepertimana keadaannya, hanya berdasarkan alasan remeh.

[4] Rintangan utama yang digambarkan oleh pihak-pihak kepada penjualan tersebut atas penolakan Kerajaan Negeri untuk melepaskan hartanah yang diperihalkan itu daripada pengambilan wajib. Setelah rintangan itu dilalui, apa yang tinggal adalah hanya formaliti mendapatkan persetujuan mahkamah bagi penjualan tersebut. Ini adalah dengan itu merupakan kes yang wajar untuk mendekrikan pelaksanaan spesifik, bukan seperti yang diperintahkan oleh hakim yang bijaksana, tetapi berdasarkan terma-terma.

[5] Perintah hakim yang bijaksana diubah dengan mendekrikan pelaksanaan spesifik atas terma-terma bahawa defendan-defendan memohon kepada mahkamah, tidak lewat daripada tujuh hari, untuk persetujuan formal sepertimana yang diperuntukan dalam fasal 8 perjanjian tersebut. Sekiranya defendan melakukan kemungkiran, plaintif-plaintif bebas untuk mendapatkan kelulusan daripada mahkamah untuk penjualan hartanah yang diperihalkan itu kepada mereka. Dan, sekiranya persetujuan ditolak oleh mahkamah, ianya akan terbuka kepada defendan-defendan untuk mengusul bagi mendapatkan dekri supaya dikosongkan atas alasan kemustahilan pelaksanaan. Rayuan-rayuan ditolak melainkan bagi perubahan tersebut.

[Rayuan ditolak; perintah sekadarnya.]

Case(s) referred to:
Cooper v. Morgan [1909] 1 Ch 261 ***(refd)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 MLJ 211 ***(refd)***
Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 MLJ 155 ***(refd)***

Legislation referred to:
Specific Relief Act 1950, ss. 11(2), 21(1)

Civil Appeal No: 556/97
For the appellants - R Abraham (Gita Sundaram with him); M/s Shook Lin & Bok
For the respondent - R Rajasingham (RR Sethu with him); M/s R Rajasingham & Co

Civil Appeal No: 593/97
For the appellants - Ong Keng Leong; M/s Ghazi & Lim
For the respondent - R Rajasingham (RR Sethu with him); M/s R Rajasingham & Co

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

Introduction

There are two appeals before us. Both arise from the same suit. The appellants in Civil Appeal No. 556/97 ("the first appeal") were the first and second defendants in the court below. They were sued as the additional trustees of the estate of one Ong Joo Sun, deceased ("the deceased"). The appellant in Civil Appeal No. 593/97 ("the second appeal") was the fourth

defendant in the court below. He was one of the original executors and trustees of the deceased's will. He was originally not a party to the suit filed by the respondents as plaintiffs. But he applied to be added as a defendant and obtained an order to that effect on 19 April 1982. For completeness, I may add that the State Government of Penang was cited as the third defendant in the suit. However, it is not before us in the appeal. Throughout this judgment I shall refer to the parties as they appeared in the court below.

Facts And Background

The deceased was, during his lifetime, the registered proprietor of a piece of land held under Lot No. 532, Mukim 12, South West District, Penang ("the subject property"). The deceased died testate on 20 March 1960. His will was proved on 13 December 1963. On 25 August 1975, the High Court made an order directing, *inter alia*, that the deceased's estate be administered according to the terms of his will and that his immovable properties be sold and the proceeds of sale be paid into court to the credit of his estate. Meanwhile, by a notification No. 103 in the Gazette published on 25 April 1974, the State Government of Penang declared its intention to acquire the subject property.

On 8 January 1979, the plaintiffs entered into an agreement ("the sale and purchase agreement") with the first defendant and one Ong Thai Hong ("the vendors") as additional trustees of the deceased's estate to purchase the subject property. The purchase price was to be calculated at RM1.60 per square foot. A deposit of RM150,000 which amounted to approximately 5% of the total purchase price was paid by the plaintiffs at the date of the sale and purchase agreement. The second defendant who was appointed as an additional trustee executed the sale and purchase agreement on behalf of Ong Thai Hong.

The sale and purchase agreement recognised the declaration of acquisition of the State Government of Penang. It made provision for this and certain other important matters. These are contained in four clauses of the sale and purchase agreement. They are cls. 3, 5, 7 and 8. They are crucial to the controversy between the parties to the present litigation. This is what they say:

Clause 3

The purchase shall be subject to:

(a) The property being released by the Penang State Government;

(b) The Trustees deducing a good and marketable title to the property sold;

(c) The property sold to be free from all encumbrances whatsoever;

(d) Without vacant possession;

(e) Completion of the purchase to be within 6 months from the date of Court Order sanctioning the sale by the Trustees.

Clause 5

If for whatsoever reasons the Penang State Government refused to release the said property from the restrictions imposed under the Land Acquisition Act, 1960 to the Estate of Ong Joo Sun, deceased within two (2) years from the date hereof, this agreement, notwithstanding Clause one (1) to three (3) aforesaid, shall be null and void.

Clause 7

The Trustees shall apply to the Penang State Government for the release of the said property back to the Estate of Ong Joo Sun, Deceased for sale to the Purchasers.

Clause 8

The Trustees shall also apply to Court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance, 1959.

The agreement also makes the following provisions, namely –

(1) that the deposit of 5 % is to be immediately refunded to the plaintiffs if the subject property is not released "from the restrictions of the Land Acquisition Act 1960" (cl. 6);

(2) that time shall be of essence of the contract (cl. 13); and

(3) that the deposit will be forfeited in the event the plaintiffs fail to complete the purchase (cl. 16).

Following the execution of the sale and purchase agreement there was an exchange of correspondence between the parties. I will not advert to it in any detail because it has been set out at length in the judgment under appeal. In summary, the correspondence deals with the question whether the subject property had been released from acquisition by the Penang State Government. The first, second and fourth defendants took the position that no such release had taken place and that the sale and purchase agreement was at an end. The plaintiffs, on the other hand, in their letters contended that the sale and purchase agreement was still on foot.

Later, the plaintiffs instituted proceedings claiming specific enforcement of the sale and purchase agreement. The first, second and fourth defendants resisted the action. The learned judge, by a somewhat tortuous route, found for the plaintiffs. It is against the decree of specific performance issued by the learned judge that the present appeals have been brought.

The Issues In The Appeal

The arguments in support of the appeal raise two issues. First, whether the sale and purchase agreement is available for enforcement. Second, even if it is, whether specific performance may be decreed in the absence of an order of the court granting leave to sell the subject property.

The first issue, is in my view, a straightforward question of construction of the sale and purchase agreement. It is a matter of relating the words used by the parties to express their intention to the facts existing at the material time, that is to say, when the parties went into dispute.

The second issue raises a question of law. It has to do with the propriety of decreeing specific performance in a case where an order of court is postulated as a pre-requisite. Each of these issues must be considered in turn.

Is The Sale And Purchase Agreement Extant?

Mr. Romesh Abraham's arguments in support of the first appeal were upon the basis that the Penang State Government had not released the subject property from acquisition. His submissions were accordingly centred upon the proposition that it was not open to the plaintiffs to waive the terms of cl. 5 of the sale and purchase agreement when seeking specific performance. He argued that cl. 5 was a condition precedent which had failed thereby rendering the sale and purchase agreement incapable of specific enforcement.

However, Mr. Sethu, when responding to Mr. Abraham's arguments, submitted that the waiver point was of pure academic interest because the subject property had in fact been released from acquisition by the Penang State Government within the period stipulated in cl. 5. He drew attention to three letters written by the Collector of Land Revenue. They are dated 9 January 1980, 20 May 1980 and 11 June 1980 respectively. In all these letters the collector informed the solicitors for the vendors that steps were being taken to cancel the notice of acquisition. That the vendors accepted this to be the case is reflected in their solicitors' letter of 17 June 1980.

The question is whether, based on these letters, the stipulation contained in cl. 5 has been satisfied. That, I think, is a pure question of construction.

Looking at cl. 5 once again, it is to be noted that it is not couched in affirmative language. It does not say that the State Government must release the subject property from compulsory acquisition. It is couched in negative terms. It calls for a refusal on the part of the State Government. The actual words used are: "If for whatsoever reasons the Penang State Government refused to release the said property from the restrictions imposed under the Land Acquisition Act 1960". In other words, what the parties postulated was a refusal from the State Government to release the subject property from compulsory acquisition. If there had been a refusal, then the agreement would, on high authority, be at an end. There would be no contract available for enforcement.

In *National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd.* [1983] 2 MLJ 211, the parties had entered into an agreement that was made subject to the approval of the Foreign Investment Committee (FIC). The FIC refused to grant its approval. It was held that there was no agreement capable of enforcement. Salleh Abas, CJ (Malaya), when delivering the judgment of the Federal Court, said (at p. 218):

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (See *Trans Trust SPRL v. Danubian Trading Co Ltd* [1952] 2 KB 297, 304 – per Denning, LJ – and Property and *Bloodstock Ltd v. Emerton*; *Bush v. Property and Bloodstock Ltd* [1967] 3 All ER 321, 330 – per Sachs, LJ.

> Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

I am conscious that the relevant clause in *Sharidal (ibid)* was constructed in terms different from cl. 5 in the present appeal. In *Sharidal*, it was couched in affirmative language, namely the obtaining of an approval from the FIC. However, cl. 5 in the present case is, as I have said earlier, couched in negative terms. But I do not apprehend this difference to be material in point of principle. The condition in *Sharidal* was held to be suspensory in nature. In substance cl. 5 is no different. It too is suspensory. If therefore, in the present instance, there had been a refusal by the State Government, it would have produced the same consequence as in *Sharidal*.

To my mind, it is quite clear that what the parties to the sale and purchase agreement were anticipating in cl. 5 was a refusal by the State Government. The letters of the collector show that there was no refusal. The contingency provided for by the sale and purchase agreement did not happen. The contract contained in the sale and purchase agreement therefore holds good and the respective obligations thereunder are available for specific enforcement.

I must confess that I have had considerable difficulty in understanding the judgment of the learned judge and in appreciating his reasoning for holding in the plaintiffs' favour. Nevertheless, for the reasons already given, I would uphold his finding that the sale and purchase agreement was valid and binding upon the parties.

That brings me to the second issue.

Is Leave Of Court Necessary?

The subject property belongs to the estate of a deceased. It therefore comes as no surprise that the vendors and the plaintiffs expressly required an application to court for leave to sell it. So, when one comes to deal with the question whether specific performance ought to be decreed, one is met by the question: specific performance of what? And the answer must surely be: of the vendors' obligations under the sale and purchase agreement. Among these obligations is that housed in cl. 8 which requires the vendors to formally obtain the court's sanction for the sale of the subject property to the plaintiffs. However, no such application as provided by cl. 8 was ever made by the vendors. It follows that the court giving its formal sanction for the sale is one of the conditions predicated by the sale and purchase agreement.

Mr. Sethu for the plaintiffs has urged that the judge's decision to decree specific performance in itself amounts to the grant of his sanction. With respect, I am unable to agree with this submission. If that was indeed the case, one would expect the point to have been expressly dealt with by the learned judge. Yet, nowhere in his lengthy judgment has the learned judge addressed this issue when exercising his discretion to grant specific performance.

It is trite that all forms of specific relief are in the discretion of the court. It is equally trite that the discretion conferred is not a fanciful one. It is a discretion that must be exercised in accordance with sound principles. In the case of the remedy of specific performance this is made amply clear by s. 21(1) of the Specific Relief Act 1950 which provides:

> 21(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

I take it as settled law that the initial function of this Court in a case as the present is one of review only. The fact that I may differ with the learned judge in the way discretion was exercised affords no ground to reverse him. If, however, it is demonstrated that the trial judge failed to take into account relevant considerations or took into account irrelevant considerations or misdirected himself in law or that his order is plainly unjust, then and then only is this Court entitled to interfere with the exercise of discretion.

In the present instance, it is amply clear that the learned judge failed to consider sufficiently, or at all, the effect of cl. 8 when exercising his discretion to decree specific performance. This is therefore a case which in my view warrants appellate interference. However, having regard to the special circumstances of this case it would, in my judgment, be unjust to the plaintiffs to deny them specific relief altogether. It must not be forgotten that there is here a contract for the sale of immovable property. It is the kind of obligation that statute rebuttably presumes to be incapable of being remedied by an award of monetary compensation. (See, s. 11(2) of the Specific Relief Act 1950.) Moreover, this appears to be a case where the vendors, having entered into a perfectly valid transaction went about inventing all sorts of excuses to get out of it. Having failed in their efforts, it would be quite wrong to permit them to succeed, as it were, on the strength of a mere side-wind. The main obstacle envisaged by the parties to the sale was the State's refusal to release the subject property from

compulsory acquisition. That hurdle having been crossed, all that remains is the mere formality of obtaining the court's sanction for the sale. This is therefore an appropriate case to decree specific performance, not as ordered by the learned judge, but on terms.

In my view, a Court of Equity is sufficiently empowered to decree specific performance on terms. There are cases where an order decreeing specific performance has made provision for ancillary matters, such as the payment of purchase money with interest. (See, eg, *Cooper v. Morgan* [1909] 1 Ch. 261.) In such cases, the payment of the purchase price is a term upon which relief is granted. If there is non-compliance, the vendor must surely be at liberty to apply to have the decree vacated.

There is also precedent for decreeing specific performance and then leaving it to the defendant to later apply to have the decree vacated on the ground of impossibility of performance. Thus, in *Sekemas Sdn. Bhd. v. Lian Seng Co. Sdn. Bhd.* [1989] 2 MLJ 155, Lee Hun Hoe CJ (Borneo) when delivering the judgment of the Supreme Court said (at p. 157):

> In *Johnson & Anor v. Agnew* [1979] 1 All ER 883, the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded ab initio but remained in existence until it was terminated by the court.

Each case must depend on its own facts. The terms, if any, that may be imposed must e*x necessitae rei* depend on the facts and circumstances of the particular case.

Conclusion

Having satisfied myself of the existence and the width of the jurisdiction in equity, I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl. 8 of the sale and purchase agreement. Such application shall be made not later than seven days from the date of this judgment. In the event the vendors make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject property to them. Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance. Additionally, the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree hereby granted.

The Upshot

Save that the order made by the learned judge is varied to the extent hereinbefore stated, I would dismiss both appeals. Having regard to circumstances of the case, I would order that each party shall bear its own costs. However, the order as to costs made in the court below shall stand undisturbed. The deposits lodged by the appellants in both appeals shall be refunded to them.

My learned sister Siti Norma Yaakob JCA and my learned brother Denis Ong Jiew Fook JCA have seen this judgment in draft and agree with the reasoning and the conclusions therein.